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No. 94-916

In The

Supreme Court of the United States

October Term 1994

KATHRYN THOMPSON REMMEY and
ERNEST M. REMMEY, Executors
of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED
and ARNOLD MARKS,
Respondents.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

MACK SPERLING*
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: 910/271-3125

Attorney for Respondents
*Counsel of Record

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents PaineWebber Incorporated and Arnold Marks respectfully submit that a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit in *Remmey v. PaineWebber Inc.*, 32 F.3d 143 (4th Cir. 1994), is unnecessary and should not issue for the reasons set forth below.

STATEMENT OF THE CASE AND FACTS

The issues raised by this Petition concern the integrity of the three member arbitration panel which heard and rejected Petitioners' claims. Petitioners assert that each panel member was biased or unqualified to serve as an arbitrator and the award should be vacated under the Federal Arbitration Act, 9 U.S.C.§1 *et seq.*

There are no novel questions here, no new rule of law and no change in existing law advocated by the Petitioners. They say only that the courts below did not properly apply settled law to the facts now before this High Court. Two courts have already reviewed the facts and considered the law, however, and the four judges of those two courts have been in unanimity that there is no basis for disturbing the decision of the arbitrators. The Petition for Certiorari should be denied.

The facts in this securities arbitration, which was conducted under the auspices of the National Association of Securities Dealers (the "NASD"), were hotly contested. They were presented in ten hearing sessions over a period of five days. Petitioners contended that their decedent (Louise Remmey) was incompetent at the time that she made investments with the Respondents in certain real estate limited partnerships. There was substantial countervailing evidence presented by the Respondents as to the competence of the decedent and her intentions in making these investments. Mrs. Remmey was described by her own family as "strong

willed" and "independent". (JA138).[1] Her friends described her as a "businesswoman" and "completely lucid". (JA160). Her personal physician testified that she was competent to conduct her financial affairs. (T27 [S7-8]). She followed her investments closely, and she personally came to the brokerage firm office once a week. (JA124). She maintained detailed ledgers of her investments. (JA127, 141). The limited partnerships in which she decided to invest met her investment objectives of current income and potential appreciation of the underlying property. (JA75-76, 171).

Mrs. Remmey signed a statement for each of her partnership purchases that she had received a prospectus and that she had knowledge of its contents. (JA92-93, 97). Investments of his type did not carry in the late 1980's the negative connotation that they do today. The real estate limited partnerships in which Mrs. Remmey invested had at that time a ten year track record of successful syndications. (JA84, 96). They had been offered by a "leader" in the business, according to Mrs. Remmey's own expert witness. (JA111).

There was conflicting evidence too of the extent of Mrs. Remmey's loss. Every one of these partnerships was continuing to make regular, quarterly payments to Mrs. Remmey at the time of the arbitration hearing. (JA171). There was evidence that her account had an overall profit of $90,000 during the time Mr. Marks served as her broker. Hindsight may have proven that better investments could have

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[1]The references to "JA" are to the Joint Appendix filed with the Fourth Circuit. The references to "T" are to the Transcript of the arbitration proceeding.

been made, but if that were the test, every bad investment would be the basis for a claim of fraud.

The arbitrators credited the testimony presented by the Respondents and found for the broker and the brokerage firm. They awarded Petitioners nothing on their claims. Petitioners' unflagging effort since then to upset the determination of the arbitrators has been targeted at the qualifications and character of the arbitrators.

REASONS FOR DENYING CERTIORARI

I.

The Petition Is Premised On The Unfounded Argument That Arbitration Awards Are To Be Closely Scrutinized By The Federal Courts.

The standard of review of arbitration awards is an important concern here. Petitioners advocate that the federal courts are to engage in searching oversight of the arbitration process, relying on *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987). That case does not say (as Petitioners say it does) that it is the job of the judiciary to supervise the decisions of arbitrators. What the Court said in that case was this:

> we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although **judicial scrutiny of arbitration awards necessarily is limited**, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

Id. at 232 (emphasis added).

Review of arbitration awards is indeed limited, as the Fourth Circuit noted in *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276 (4th Cir. 1992):

> '[T]he effectiveness of any pro-arbitration policy is dependent, in the first instance, on a limited scope of judicial review of the arbitrator's determination.' *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 360 (1971)(Harlan, J., concurring). Thus, judicial review of an arbitration award is '**among the narrowest known to the law.**' *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978). '**Every presumption is in favor of the validity of the award.**' *Burchell v. Marsh*, 58 U.S. 344, 351 (1855).

973 F.2d at 278 (emphasis added).

The scope of judicial review of the awards of arbitrators is created and bounded by the terms of 9 U.S.C. §10(a). The pertinent part of the statute reads as follows:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration —

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Petitioners have not bothered to detail in their Petition the statutory ground for their challenge, but the attack on the integrity of Arbitrator Johnson is presumably one of "evident partiality or corruption" under §10(a)(2). The attack upon Arbitrators Lewis and Schwimmer is not one of partiality, but

only that they were not properly qualified to be arbitrators. That claim does not fit well into the statute, but it is perhaps a suggestion that "the award was procured by. . .undue means." *Id.* at §10(a)(1). Both claims are without merit.

II.

Petitioners Did Not Meet The High Standard, Which Prevails Uniformly Throughout The Circuits, Necessary To Establish "Evident Partiality" In The Award.

There is no split among the Circuits, as Petitioners contend, regarding the standard applicable to determining whether there has been "evident partiality." The required showing is that "a reasonable person would have to conclude that an arbitrator was partial" to the successful party at the arbitration. *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir.), *cert. denied*, 493 U.S. 809 (1989); *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2d Cir. 1984); *Accord Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982)("reasonable impression of partiality"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983)(circumstances must be "powerfully suggestive of bias"); *Toyota of Berkeley v. Automobile Salesmen's Union*, 834 F.2d 751, 756 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988)("a reasonable impression of partiality.").[2]

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[2]The reliance of Petitioners on *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) to establish the materiality of the alleged "non-disclosure" of Arbitrator

The Fourth Circuit's ruling was consistent with this standard. It said in its opinion that "a mere appearance of bias is insufficient to demonstrate evident partiality.. . .[An appellant] must establish specific facts that indicate improper motives on the part of an arbitrator." 32 F.3d at 148 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993)). It is the "specific facts" indicating improper motive which were never presented by Petitioners, and which caused them to fall short of the "reasonable person" standard which prevails throughout the Circuits.

A.

"Evident Partiality" Is Established By An Arbitrator's Financial Interest In The Arbitration Or A Relationship With One Of The Parties.

Evident partiality typically arises when there is an arbitrator who has either a financial interest in the arbitration or a preexisting relationship with one of the parties, or both. That was the situation confronted by this court in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), where the arbitrator and one of the parties had "close financial relations that had existed between them for a period of years." *Id.* at 148.

Johnson is more than curious. *Affiliated Ute* creates a presumption of reliance in securities fraud cases that an omitted fact was "material" for liability purposes. To Respondent's knowledge, the doctrine has never been applied in an arbitration case.

The factors which courts therefore traditionally examine in assessing a claim of evident partiality are the financial interest, the directness of the relationship, and the timing of the relationship. *Sanford Home for Adults v. International Federation of Health Professionals*, 665 F. Supp. 312, 320 (S.D.N.Y. 1987); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1360 n.21 (6th Cir.), *cert. denied*, 493 U.S. 809 (1989). These are the **only factors** which will establish bias. *See, e.g., Herrin v. Milton M. Stewart, Inc.*, 558 So.2d 863, 865 (Miss. 1990)("Personal bias of an arbitrator cannot be shown by means other than pecuniary interest or some other actual relationship between the parties.").

The problem that has plagued Mrs. Remmey throughout her tortuous course through the courts below is that her suggestion of partiality is without any foundation whatsoever. There is nothing here to cause a reasonable person to conclude that any arbitrator was partial to the Respondents.

B.

The Minor Disciplinary History Of Arbitrator Johnson Is Not "Evident Partiality."

There are no facts here that any of the arbitrators had an interest in the outcome of the arbitration. What the Petitioner contends is the "evident partiality" here is that Arbitrator Johnson had a record of discipline with the NASD, and that this was not disclosed to him. There were disciplines, but they were for very old and very minor infractions. They were of a bookkeeping nature. None involved a customer complaint like the one at issue in this arbitration.

The first violation was sixteen years old. It was resolved by settlement, apparently without any complaint being filed. Some transactions at Arbitrator Johnson's firm had not been booked for a period of four days in 1978. There were some inaccuracies in ledgers, and some transactions had not been liquidated in the proper period of time. The firm was also charged with failing to maintain adequate supervisory procedures, since four people designated to perform such functions were no longer with the firm. The firm replaced its bookkeeping personnel and updated its supervisory procedures to reflect its then current personnel. The firm was fined $500. (JA289-91).

The only Complaint ever filed personally against Arbitrator Johnson (as opposed to the firm for which he worked) which resulted in any penalty was Complaint No. W-361, which was filed with the NASD in November 1979. (JA282-85). This Complaint alleged that (I) Arbitrator Johnson's firm had failed to comply with the SEC's net capital rules, (ii) it had failed to report its net capital deficiency to the proper authority and (iii) it had put a sticker on "various prospectuses" which obscured the names of some of the other underwriters for the offering.

This Complaint was also settled. The NASD found the net capital "violations" to be extremely minor, and to have lasted all of a day. It found the stickering matter "more serious", but noted that the recipients of the prospectuses were primarily longstanding clients of the firm who were familiar with its business. Arbitrator Johnson and the firm

were fined the sum of $1,000, jointly and severally, for these violations. (JA285).[3]

Arbitrator Johnson's "record", such that it was, had been "clean" for over twelve years when the arbitration took place. If these violations established some sort of bias, that bias was certainly minimized by the remoteness of the violations. *See Ruffin Woody and Associates, Inc. v. Person County*, 92 N.C.App. 129, 141, 374 S.E.2d 165, 172 (1988)(refusing to set aside arbitration award where one arbitrator had performed services for a party in the 1960's; work was "remote enough in time to dissipate any partiality. . . ."), *rev. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989).

But what Petitioners have never shown is how these minor disciplines from the NASD equate to bias on the part of Arbitrator Johnson. Petitioners point to no facts which establish that these minor sanctions impaired Arbitrator Johnson's ability to fairly hear and rule upon the evidence. In fact, precisely the opposite inference might be warranted here — that the sanctions made Arbitrator Johnson more circumspect in judging the conduct of other brokers and biased him **against** the Respondents. Either way, however, the suggestion of bias is only speculation. The law requires more than that. The party seeking to set aside an arbitration award must show that the bias is "**direct, definite and capable of demonstration**. . . ." *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993)(emphasis added); *Atlantic Shores Resort Joint Venture v. Martin*, 731 F. Supp. 1279 (D.S.C. 1990).

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[3]Another NASD complaint against Arbitrator Johnson's firm dates back to 1971. It was dismissed. (JA302).

There is no argument to be made here that the NASD Rules required disclosure of these matters. The NASD's Code of Arbitration Procedure provides only that a party is entitled to "the arbitrators' names and employment histories for the **past ten (10) years**" and that further inquiry may be made. NASD Code §21 (emphasis added). These ancient matters were not required to be disclosed, but they were hardly a secret. Petitioners discovered them on their own, after the arbitration was over, through the NASD's "Public Disclosure Program". This information was readily available for the asking before the arbitration began, but Petitioners did not obtain it. It would hardly have involved the "time-consuming and expensive. . .background check on the arbitrators" which Petitioners suggest would have been necessary for them to have requested this information in advance of the arbitration.

To the extent the Petitioners complain that Arbitrator Johnson did not disclose these disciplines to the NASD when he applied to be an arbitrator, that contention is also not a basis for certiorari. The "concealment" is hardly clear from the disclosure form, but the NASD was the body which had meted out the discipline. It surely knew of these disciplines when it qualified Mr. Johnson as an arbitrator. There was no evidence presented in the court below that these minor and dated disciplines disqualified Arbitrator Johnson from being an arbitrator.

This Court should not grant certiorari to entertain this after the fact challenge to the award.

III.

The Complaint That Arbitrators Lewis and Schwimmer Were Not Properly Qualified Is Without Merit.

The challenges raised to Arbitrators Lewis and Schwimmer have equally little substance. Arbitrator Lewis, it is suggested, was not properly qualified as a public arbitrator.[4] The reason is that he "might" have spent more than 20% of his time since retiring as a Deputy Securities Commissioner for the State of South Carolina acting as an expert witness for securities firms. There is nothing to substantiate that claim. Petitioners brought forward no evidence to establish the extent of Arbitrator Lewis' activity in this arena. But if Arbitrator Lewis had such an affiliation, he was required to disclose it. Section 23 of the NASD Code says in pertinent part that:

> (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

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[4]The NASD Rules provided that this panel was to be composed of one arbitrator affiliated with the securities industry, and two public arbitrators without such an affiliation. NASD Code §19(a). A person cannot be a public arbitrator if he "is an attorney, accountant, or other professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years." *Id.* at §19(c)(5).

* * *

> (2) **Any existing** or past financial, **business, professional**, family, or social **relationships** that are likely to affect impartiality or might reasonably create an appearance of partiality or bias.

NASD Code §23(a)(2)(emphasis added). Arbitrator Lewis would have been required to disclose his expert witness activities if they had occurred. He did not, and the presumption must be that he was qualified to be a public arbitrator.

Arbitrator Schwimmer is a target of the Petitioners' unhappiness with the result they obtained because he may not have ever completed an arbitrator profile form. Testimony from the NASD, however, made it clear that Arbitrator Schwimmer had properly qualified as an arbitrator before such forms began being used. The NASD's Director of Arbitration made it unequivocally clear that the lack of a completed form did not disqualify Mr. Schwimmer from service in an Affidavit she signed. (JA366 at ¶¶3, 6).

Petitioners argue that Arbitrator Lewis and Arbitrator Schwimmer could not have been properly qualified as arbitrators because they did not return a questionnaire to update their arbitrator profiles. Petitioners contend that this violated regulations of the Securities and Exchange Commission, but they point to no such regulations and in fact there are none. The Director of Arbitration made it clear in the Affidavit she filed with the District Court that the lack of a completed questionnaire did not disqualify a person as a public arbitrator. (JA366 at ¶3). As the Fourth Circuit noted

in its opinion, "appellants' counsel conceded at oral argument that no NASD Rule required return of the questionnaire form." before an arbitrator could be properly qualified. 32 F.3d at 147. All the NASD Rules say on this subject is that the Director of Arbitration is charged with appointing panels of arbitrators "from the existing pool of arbitrators." NASD Code §4.

Petitioners have complained long and loudly that they should have received the NASD's internal records on the arbitrators, but there is no requirement in the NASD Rules that a party to an arbitration be given such unfettered access to the business history of an arbitrator. Such a requirement would indeed be contrary to direct precedent from this Court, which is that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 151 (1968)(White, J., concurring). The Petitioners refuse to accept that there are limits on the information they were entitled to obtain regarding the arbitrators. The NASD's Code of Arbitration Procedure provides only that a party is entitled to "the arbitrators' names and employment histories for the past ten (10) years" and that further inquiry may be made. NASD Code §21. Petitioners simply were not entitled to the information which they complain was due them.

CONCLUSION

Petitioners claim that the Fourth Circuit's opinion "guts the concept of arbitration, which is to provide a convenient and less expensive way to resolve disputes." Pet. at 24. It is Petitioners, however, who have done the gutting. Their extensive post-arbitration litigation in pursuit of their

effort to obtain what the Fourth Circuit referred to as "the ultimate attempt at a second bite" at the apple (32 F.3d at 147) has eviscerated any of the expediency and convenience of an arbitration proceeding. Petitioners had their day in Court (they actually had five of them) and they did not prevail. This case should end now, and Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

MACK SPERLING*
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: 910/271-3125

Attorney for Respondents
*Counsel of Record